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In The

Supreme Court of the United States

FLORENCE MARTHA BEARDSLEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a federal criminal defendant is charged with the 5 to 15 year sentencing enhancement under 18 U.S.C. section 844(h)(1) for the alleged "use of fire to commit mail fraud," and where the alleged use of fire and initial acts of mail fraud preceded commencement of the applicable five-year statute of limitations, can the charged enhancement survive a limitations challenge by 1) construing the sequential mailings as a "continuing offense" which, although commencing outside, terminated within the limitations period or 2) construing each use of the mails as a separate offense of "using fire to commit mail fraud," where both these constructions contravene *Toussie v. United States*, 397 U.S. 112 (1970) and established principles of statutory construction?

2. Did the district court violate petitioner's Sixth Amendment right to confrontation by prohibiting cross-examination on the probationary status of a key prosecution witness who was also a potential suspect in the crime of which petitioner was convicted, in violation of *Davis v. Alaska*, 415 U.S. 308 (1974)?

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit are the same as the parties to this proceeding: petitioner Florence Martha Beardslee and respondent United States of America.

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OPINIONS AND ORDERS BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit is reported at 197 F.3d 378 (9th Cir. 1999), and is attached hereto as Appendix A. A Ninth Circuit order amending the opinion and denying a petition for rehearing and petition for rehearing en banc is reported at 204 F.3d 983 (9th Cir. 2000), and is attached hereto as Appendix C.

The unpublished order of the United States District Court for the Northern District of California denying petitioner's motion for a new trial is attached hereto as Appendix B.

JURISDICTION

Petitioner was convicted in Federal District Court for the Northern District of California of various criminal offenses on October 30, 1996. On June 6, 1997, the district court entered judgment and imposed sentence. The Ninth Circuit had jurisdiction under 28 U.S.C. § 1291. It affirmed in a published opinion filed on November 1, 1999. The Ninth Circuit amended that opinion and denied a petition for rehearing and suggestion for hearing en banc in an order filed on March 2, 2000.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. § 3282 provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

2. At the relevant time, 18 U.S.C. § 844 provided, in relevant part:

> Whoever (1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States . . . , shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 5 years but not more than 15 years. . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried.

3. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted

with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. Procedural History

On September 13, 1995, a superseding indictment was filed charging petitioner Beardslee with (1) one count of conspiracy to destroy a building used in interstate commerce by means of fire and an explosive, in violation of 18 U.S.C. sections 371 and 844(i) (Count 1); (2) one count of attempt to destroy a building, in violation of 18 U.S.C. sections 844(i) and 2(a) (Count 2); (3) one count of using fire to commit a federal felony, *viz.*, mail fraud (Count 3); and (4) nineteen counts of mail fraud based upon the submission of insurance claims concerning the burning of petitioner's building (Counts 4 through 22). Petitioner's motion to dismiss Count Three on the ground that the charge was barred by the five-year statute of limitations found in 18 U.S.C. section 3282 was denied. Petitioner's first trial ended in a mistrial due to the jury's inability to render a verdict.

A year later, petitioner was retried and found guilty on all 22 counts. She was sentenced to imprisonment for a total term of 87 months, computed as follows: (1) a term of 27 months on both Counts One and Two, both terms to run concurrently; (2) an equal term of 27 months on Counts Three to Twenty-Two, the mail fraud counts, to run concurrently to the terms imposed on Counts One

and Two; and (3) a term of 60 months on Count Three (use of fire to commit mail fraud), with that term to run consecutively to all other terms. Timely notices of appeal (by petitioner) and cross-appeal (by the government) were filed in the Court of Appeals for the Ninth Circuit. That court, in the opinions cited above, affirmed the convictions. It also granted the relief sought by government in its cross-appeal, holding that the 60-month sentence imposed for Count Three (use of fire to commit mail fraud) was statutorily required to run consecutively to the other sentences.

B. Statement of Facts

On December 10, 1989, a fire severely damaged a warehouse owned by petitioner Beardslee in Fort Bragg, California. (Reporter's Transcript [RT] 590-592). Beardslee learned of the fire by phone, and called the Fire Department and ATF in order to learn what caused the fire. (RT 966-967).

The investigation of the fire remained dormant until March of 1993, when one Barry Venable was arrested in Denver, Colorado, on a charge of assaulting a police officer with a deadly weapon in Napa, California. At that time, Venable was on probation for a drug offense, and hence faced state prison time for both the assault and a probation violation. (RT 257, 364). He eventually implicated Beardslee in an alleged burning of the warehouse which, Venable testified, Beadslee had paid him to commit. (RT 202-210).

Another prosecution witness, Ben Pierce, testified that he and Beardslee had discussed burning down the

warehouse, and that he received $2,000 from Beardslee to accomplish the job. (RT 98, 103-109). Initially, Pierce had informed ATF agents that he did not have a clue who had set the fire. (RT 114, 124, 144). Four years later, he told an ATF agent about the purported conversation with Beardslee at a time when the latter was in jail and when Pierce thought that he would never have to testify. (RT 125-126). Pierce and Beardslee eventually had a falling out, with Beardslee accusing Pierce of stealing from her, and Pierce threatening to get even with her. (RT 110-112, 146, 899).

Petitioner Beardslee testified that she did not hire Venable to burn her warehouse nor did she know in advance that he intended to do so. (RT 902). She stated she had hired Ben Pierce to work for her, but had to fire him when he could not produce the Department of Motor Vehicles documentation required for drivers. Pierce became angry and said: "You can't do this to me. I will get even with you." (RT 899, 918.)

When Annheuser-Busch terminated her 15 year beer distributorship, Beardslee initiated civil litigation against the company. She stood nothing to gain by burning her warehouse, which only had replacement insurance coverage. (RT 941, 950). Without the warehouse, she had no business to run or sell, which is why she rebuilt it after the fire. (RT 942).

Beardslee further testified that she had met Barry Venable through her daughter, and that he had made some repairs to Beardslee's home. (RT 960, 962). At one point, Venable asked Beardslee to lower the price on a car she was selling as a favor for "burning your warehouse."

(RT 986). When Beardslee, shocked, asked Venable why he would burn the warehouse, he stated that it would look like Annheuser-Busch did it, and she could collect insurance proceeds. (RT 987). Later, Venable blackmailed Beardslee by threatening to go to Anheuser-Busch with his story at a time when her civil case against Anheuser was going to trial. (RT 1003-1012).

REASONS FOR GRANTING THE PETITION

I. UNDER THIS COURT'S PRECEDENT AND FUNDAMENTAL PRINCIPLES OF STATUTORY CONSTRUCTION, THE STATUTE OF LIMITATIONS ON A SECTION 844(h)(1) ENHANCEMENT FOR USE OF FIRE TO COMMIT MAIL FRAUD MUST BE HELD TO COMMENCE NO LATER THAN THE DATE UPON WHICH BOTH THE FIRE AND AN ACT OF MAIL FRAUD HAVE BEEN COMMITTED

A. The Ninth Circuit Holding On the Limitations Issue

Both parties agree that the statute of limitations applicable to Count Three is the one contained in 18 U.S.C. section 3282, which provides that: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense has been committed." The original indictment alleged that the use of fire occurred on December 10, 1989, and on no other date. The Count Three charge of violating section 844(h) was first charged in the superseding indictment

filed on September 13, 1995, almost six years after the date of the fire. The first act of mail fraud was alleged to have occurred on February 2, 1990 (Count 11), with many more occurring prior to September 13, 1990 -- and therefore outside of the five-year limitations period.

The Ninth Circuit opinion initially holds that a violation of section 844(h) is not complete until both a fire and the predicate felony have occurred. "In the instant situation, mail fraud is clearly as much an element of Beardslee's section 844(h) violation as is the fire on which that fraud is premised. . . . " (Appendix A at 11a) The Court then finds that Count Three was not barred by the five-year limitations period because (1) each mailing constitutes "a separate mail-fraud violation," (2) a number of the mail fraud violations occurred after September 13, 1990, and (3) "thus" Beardslee violated section 844(h) within a five-year period of time preceding the September 13, 1995, date of the superseding indictment. *(Id.)*

B. The Ninth Circuit's Decision is Erroneous

Given the nature of the predicate felony of mail fraud, there would appear to be three dates upon which the statute of limitations could logically begin to run on a section 844(h) violation consisting of the "use of fire . . . to commit [mail fraud]." They are: (1) the date upon which the fire is caused by the defendant, with the intent to use it in connection with a later mail fraud; (2) the date upon which the first act of mail fraud is thereafter committed, since every element of both the fire and the predicate felony of mail fraud has occurred; or (3) each date upon which any act of mail fraud within the

five-year limitations period occurs, either because (i) the section 844(h) violation constitutes a "continuing offense," or (ii) each act of mail fraud constitutes a separately punishable "use of fire," despite the fact that only one fire was set. Petitioner submits that either of the initial two choices would be correct, and that the Ninth Circuit clearly erred in holding that the statute is satisfied if *any* act of mail fraud is committed during the limitations period.

It is hornbook law that a "crime is complete as soon as every element in the crime occurs." *United States v. Drebin*, 557 F.2d 1316, 1333 (9th Cir. 1977); *accord, United States v. Smith*, 740 F.2d 734, 736 (9th Cir. 1984). It is also "well settled that a statute of limitations begins to run when 'the crime is complete.' " *Drebin*, supra, citing *Toussie v. United States*, 397 U.S. 112, 115 (1970). In *Toussie* this Court also reaffirmed "the principle that criminal limitations statutes are 'to be liberally interpreted in favor of repose." *Id.* at 115.

In the court below, petitioner contended that the section 844(h) act of using fire to commit arson is complete on the date a fire is set with the intent to commit a federal felony. Thus it would not be a defense to a section 844(h) charge that the ultimate federal offense was never committed, for it is the use of the fire, accompanied by the required mental state, that the statute punishes. The ultimate offense which the fire is designed to effectuate is punished separately.

Alternatively, petitioner contended that the limitations period begins on the date of the initial act of mail fraud, *i.e.*, when all elements of mail fraud have occurred.

Assuming *arguendo* that a violation of section 844(h) does require both the requisite fire and the predicate felony to be committed before the penalty provided by that statute can be imposed, the statute of limitations still bars that penalty in this case. It is well settled that the crime of mail fraud is committed with a single mailing, whether or not an overall scheme continues on, or whether other mailings are committed at a later time. See, *e.g.*, *United States v. Eckhardt*, 843 F.2d 989, 993 (7th Cir. 1988). Indeed, the Ninth Circuit's opinion in this case expressly acknowledged the rule. (Appendix A at 12a, citing *United States v. Poliak*, 823 F.3d 371, 372 (9th Cir. 1987)). Thus, neither the government nor the Ninth Circuit would deny that, on the date of the first mailing in this case (February 2, 1990), petitioner could have been charged with both mail fraud and with the section 844(h) penalty. Hence the statute began to run on that date which, as noted earlier, was more than six months outside the five-year limitations period.

In the district court, the government sought to avoid this result by contending that the use of fire to commit mail fraud is a continuing offense for the purpose of 18 U.S.C. section 3282. That contention, however, cannot survive the holding in *Toussie*, a leading case with respect to what constitutes a continuing offense. In *Toussie*, this Court held that a "continuing offense" approach should not surmount a limitations bar "unless the explicit language of the criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Id.*, 397 U.S. at 115. On this basis, the Court held that the crime of failing to register for the

draft was not a continuing one, inasmuch as there was "no language in this [Selective Service] Act that clearly contemplates a prolonged course of conduct." *Id.* at 120. The Court declined to construe a "somewhat ambiguous statute" by selecting "the harsher alternative" absent Congressional language "that is clear and definite." And the Court concluded that there was nothing inherent in the act of registration which rendered the failure to do so a continuing offense. *Id.* at 120-122.

In the case at bar, section 844(h) expressly penalizes the use of fire or explosives to commit a federal felony. That offense is not a continuing one, but is rather completed either upon fire being used with the requisite intent, *or* – at the latest – on the date that the contemplated felony is actually committed. Further acts of mail fraud cannot change the fact that all elements of both the section 844(h) enhancement and the predicate felony of mail fraud have already occurred. Although any later use of fire might constitute a separate violation of the statute, there is no allusion in the statute to any conduct other than the use of fire or explosives. As in *Toussie*, "there is no language in this Act that clearly contemplates a prolonged course of conduct." *Id.* at 120. Nor is there anything about the nature of charged offense – use of fire to commit mail fraud – which inherently renders it a continuing violation. A "continuing offense" analysis, therefore, cannot support the enhancement imposed here.[1]

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[1] In an analogous setting, courts have rejected claims that where a mail fraud scheme began prior to the effective date of the federal Sentencing Guidelines, but continued after that date, it is a "straddle offense" and hence covered by the Guidelines.

Putting aside the issues raised by a "continuing offense" approach, the Court of Appeals in this case effectively held that where the relevant felony is mail fraud, the section 844(h) penalty applies anew with *each* new mailing, since "each mailing in furtherance of a prohibited scheme constitutes a separate *mail fraud violation*." (Appendix A at 12a) (emphasis supplied). Petitioner submits that this construction of section 844(h) subverts the most elementary principles of statutory construction just as it defies all considerations of logic and sound public policy. Among other things, the Ninth Circuit interpretation is fatally flawed for the following reasons:

First, the section 844(h) enhancement applies to use of a fire to commit a felony. In the case at bar, only one fire was set, so that it would be illogical to conclude that, with each new mailing, another use of fire occurred. In this regard, the decision below has effectively rewritten section 844(h) to provide for an enhanced penalty for "any felony which is *based upon* a fire," contrary to the express terms of the statute. A more sensible view would recognize one use of fire and penalize it no later than commission of the first predicate felony – here, mail fraud – but not thereafter.

The reason is that mail fraud is punishable once material is placed in the mail, and that, regardless of the continuing nature of the scheme, each mailing constitutes a separate offense. See, *e.g.*, *United States v. Barger*, 178 F.3d 844, 847 (7th Cir. 1999). "Mail fraud is not an offense listed as a 'continuing offense' whose statute of limitations begins at the end of a continuous course of criminal conduct." *Id.* at 847, citing *Toussie*, 397 U.S. 112, 134-135 (White, J., dissenting).

Second, Count Three expressly refers to the use of fire to commit *a* federal felony, namely, mail fraud. The court below, however, effectively read the count to encompass nineteen separate violations of section 844(h), thereby altering the indictment and depriving petitioner of fair notice of the charges against her. Such a view of the statute renders the Count Three charge defective as duplicitous. Duplicity violates Rule 8(a) of the Federal Rules of Criminal Procedure, which requires that an indictment contain a "separate count for each offense." Such duplicity "precludes assurance of jury unanimity, and may prejudice a subsequent double jeopardy defense." *United States v. Morse*, 785 F.2d 771, 774 (9th Cir. 1986). Furthermore, since many of the individual mailings occurred outside the five-year limit and hence are time-barred, the jury would have been required to find that the mailing selected as the basis of the Count Three conviction was within the statute, yet no such instruction was given.

Third, section 844(h) provides that a violator must be sentenced to at least five years imprisonment, the term to run consecutively to "any other term of imprisonment." Under the Ninth Circuit's view that a new section 844(h) violation occurs each time a new mailing occurs, a host of five-year enhancements would be required, not only in this case but in others like it. A person who set two fires but made only one mailing in furtherance of a fraud would receive a five-year enhancement, but a person who set one fire but made 100 mailings in furtherance would receive a century's worth of enhancements. That is because the statute, literally construed, would require the enhancement terms to run consecutively to *one another*,

and that is a draconian result which Congress surely did not intend.

Fourth, this question of first impression arises largely because of a statutory ambiguity which is the "touchstone" of the "rule of lenity." *Bifulco v. United States*, 447 U.S. 381, 387 (1980). This Court has made it clear that "the rule of lenity" applies "not only to the interpretations of the substantive ambit of criminal prosecutions, but also to the penalties they impose." *Ibid.* " 'This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.' " *Id.* at 387, and citations contained therein. Application of the rule in the context presented here is particularly apt for the foregoing reasons and in light of "the principle that criminal limitations statutes are 'to be liberally interpreted in favor of repose.' " *Toussie v. United States, supra*, 397 U.S. at 115, 122, and citations contained therein.

In sum, the Ninth Circuit's opinion fundamentally misconstrues section 844(h) and applies it unreasonably and unfairly in violation of controlling Supreme Court precedent. At the same time, because the issue presented will likely recur with some frequency, the decision below creates a dangerous contrary precedent that will confound a host of lower courts in the future. Accordingly, this Court should grant the petition and issue its writ to the Ninth Circuit.

II. IT IS VITALLY IMPORTANT TO MAINTAIN AND ENFORCE THE SIXTH AMENDMENT RIGHT TO CROSS-EXAMINATION WHERE IT MAY EXPOSE THE POTENTIAL BIAS OF ANY GOVERNMENT WITNESS SUBJECT TO UNDUE PRESSURE ARISING FROM HIS VULNERABLE STATUS AS A PROBATIONER, AS SET FORTH IN *DAVIS V. ALASKA*

Initially, Ben Pierce told ATF agents he had no idea who had set the fire at petitioner's warehouse. Four years later, while on probation, Pierce changed his story and accused Beardslee of paying him money to burn down her barn. This was the testimony he gave at the first trial, during which he admitted – upon cross-examination – that he was on probation. (RT [Initial Trial] 43) After that trial ended in a hung jury, the government obtained a ruling in limine which prevented the defense from asking Pierce about his probationary status at Beardslee's second trial (RT 84), which ended with her conviction. On appeal, petitioner claimed that this ruling was a patent violation of this Court's holding in *Davis v. Alaska*, 415 U.S. 308 (1974). The Ninth Circuit's initial opinion, however, concluded that the relevance of Pierce's probationary status was "marginal at best," and that he was "adequately examined on other issues that touched on his credibility and possible bias against Beardslee. . . . " (Appendix A at 8a) On this basis, the Court's amended opinion expressly concluded that any error in prohibiting the cross-examination was harmless beyond a reasonable doubt. (Appendix C at 1c-2c) As discussed below, however, all of these conclusions are insupportable.

" '[A] witnesses's credibility could very well be a factor of central importance to the jury, indeed every bit as important as the factual elements of the crime itself.' " *United States v. Wallach*, 935 F.2d 445, 458 (2d Cir. 1991). As this Court has said, "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). That is particularly true where, as here, the witness in question is crucial to the government's case.

The primary purpose of the Sixth Amendment's right of an accused "to be confronted with the witnesses against him" is to *"secure for the opponent the opportunity of cross-examination."* *Davis v. Alaska*, 415 U.S. at 315-316, quoting 5 Wigmore, *Evidence* at 123 (3rd ed.) (emphasis in original). Cross-examination, in turn,

> is the principal means by which the believability of a witness and the truth of his testimony are tested. . . . A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. . . . . We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

Davis, 415 U.S. at 316-317.

"In a criminal case, bias may be manifested by the witness's legal status and the treatment the witness has

received or expects to receive." *Weinstein's Federal Evidence*, § 607.04[2][a], and citations contained therein. In this regard, many courts have acknowledged the obvious: that it is "difficult to imagine anything more valuable than personal physical freedom." *United States v. Singleton*, 144 F.3d 1343, 1350 (10th Cir. 1998), *rev'd en banc on other grounds*, 165 F.3d 1297 (10th Cir. 1999), and citations contained therein. Thus in *Davis* this Court found that "even a state's interest in protecting the confidentiality of juvenile offenders' records must yield when the witness's probationary status provides a basis for inferring undue prosecutorial pressures *or* a motive to lie because of possible concern at being regarded as a suspect." *Weinstein's Federal Evidence*, at 607.26, citing *Davis* (emphasis supplied).

In *Davis*, as here, the trial court refused to permit the defendant to cross-examine a key prosecution witness concerning his probationary status. After making the observations about bias and cross-examination quoted above, this Court reversed the defendant's conviction, stating that

> [t]he accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defendant sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, cf. *Alford v. United States*, 282 U.S. 687 (1931), as well as of Green's possible concern that he might be a suspect in the investigation.

"Petitioner was thus denied the right of effective cross-examination which 'would be constitutional error of the

first magnitude and no amount of showing want of prejudice would cure it.' " *Id.* at 318, and citations contained therein; *see also Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).[2]

As noted, the Ninth Circuit's holding that the alleged error was not prejudicial rested primarily on its conclusion that Pierce's probationary status was of limited relevance. That conclusion, in turn, essentially relied on two purported observations: first, that the evidence against Beardslee apart from Pierce's testimony was considerable, thereby rendering that testimony non-essential; and second, that Pierce was "adequately examined on other issues that touched on his credibility and possible bias against Beardslee." (Appendix A at 8a; Appendix C at 1c-2c, and n.1) These observations not only disregard indisputable facts but also profoundly misconstrue the constitutional rationale for this Court's opinion in *Davis*.

First, and contrary to the opinion's initial observation, Pierce was a critical part of the government's case without whose testimony the government could never have obtained a conviction. Barry Venable was the only other witness who directly implicated Beardslee, and Venable was an admitted perjurer who concededly set the

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[2] "In this case, however, the trial court prohibited *all* inquiry into the possibility that Fleetwood would be biased as a result of the State's dismissal of his pending public drunkenness charge. By thus cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness with a motive for favoring the prosecution in his testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause." *Van Arsdall*, 475 U.S. at 679 (emphasis in original).

fire in issue but escaped any meaningful punishment by accusing Beardslee of putting him up to it. Furthermore, as noted above, petitioner's first trial, where the jury *was* informed of Pierce's probationary status, resulted in a hung jury, whereas the second trial, where Pierce's status was concealed, resulted in a conviction.[3]

In addition, the government – having gained the improper exclusion of that evidence – compounded the unfairness, and the prejudice to Beardslee, by falsely stating in closing argument that Pierce was "not a criminal." This tactic, highly prejudicial to Beardslee, also constitutes misconduct by the government in making to the jury, during closing argument, a knowingly false contention. *Cf. United States v. Kojayan*, 8 F.3d 1315, 1323-1324 (9th Cir. 1993); *Reutter v. Solem*, 888 F.2d 578, 581 (8th Cir. 1989) (state prosecutor withheld *Brady* information and

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[3] The amended opinion purports to distinguish *Davis* by noting that the witness in that case was himself a suspect in the alleged crime. (Appendix C at 1c, n.1). That observation, however, is misplaced. In the present case, Pierce was likewise a potential suspect, for he testified that he had discussed burning the warehouse down with the defendant and had paid money to a friend to do the job (RT 98-104). Furthermore, it is clear from the language used in *Davis* that the right to cross-examination is violated by the exclusion of evidence which will "afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer" *as well as* his possible fear of being a suspect." 415 U.S. at 318. This disjunctive reading is also applied to *Davis* by *Weinstein's Federal Evidence* at 607.26 (referring to witness's probationary status as a basis "for inferring undue prosecutorial pressures *or* a motive to lie because of possible concern at being regarded as a suspect"). Under *Davis*, therefore, vulnerable status *alone* triggers the right to cross-examine.

made grossly misleading statements in closing argument). Under these circumstances, the Ninth Circuit's finding of harmless error is founded on a fundamental misconstruction of the record.

Finally, as to the purported adequacy of Pierce's cross-examination on other grounds, any personal bias which Pierce harbored against Beardslee is essentially distinct from his bias arising from his "vulnerable status as a probationer" and his consequent fear of revocation. Cross-examination on the latter issue, therefore, cannot be considered either "cumulative" or insignificant to Beardslee's available defenses at trial. Thus, contrary to the Ninth Circuit's approach in this case, other Circuit Courts of Appeal have consistently held that a defendant who has been permitted to cross-examine on one basis nonetheless has a constitutional right to demonstrate a witness's bias or interest on a separate, and perhaps more convincing, basis. For instance, in *Carrillo v. Perkins*, 723 F.2d 1165, 1169 (5th Cir.1984), the Court stated:

> A witness' personal enmity toward a defendant is only one source of bias; that same witness may also harbor a desire to curry favor with the state. A jury might conclude that the latter motive was more potent than personal animus or political vendetta and that the threat of prosecution would make [the witness] less faithful to his oath of honesty than would those other motives.

See also Brown v. Wainwright, 785 F.2d 1457, 1466 (11th Cir. 1986) ("The testimony here did not merely reinforce a fact that the jury already knew; the truth would have introduced a new source of potential bias."); *United States v.*

Sanfilippo, 564 F.2d 176, 178 (5th Cir. 1977) ("The fact that the history of a witness shows that he might be dishonest does not render cumulative evidence that the prosecution promised immunity for testimony. A jury may very well give great weight to a precise reason to doubt credibility when the witness has been shown to be the kind of person who might perjure himself.")

The issue involved here is not only important but timely. In a variety of situations, the federal courts are grappling with serious problems posed by the testimony of witnesses who are, for one reason or another, acutely vulnerable to government action. Although government prosecutors operate under a high ethical standard, "the temptation is always there: It's the easiest thing in the world for people trained in the adversarial ethic to think a prosecutor's job is simply to win." *Kojayan*, 8 F.3d at 1324 (listing cases in which various types of prosecutorial misconduct involved the withholding of evidence useful to defendants); *see also United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991). Indeed, in one recent and highly publicized case, a panel of the Tenth Circuit held that the government was statutorily barred from obtaining testimony in exchange for acts or promises of leniency. *United States v. Singleton, supra*, 144 F.3d 1343, *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999). Although the panel's decision in *Singleton* was reversed *en banc*, its thoughtful opinion discusses many of the problems inherent in the government's reliance on such testimony.

That is why there must be no erosion of those rights which defendants do possess – including the Sixth Amendment rights of confrontation and cross-examination – to apprise the jury of any biases which prosecution

witnesses have in general, and in particular any ways in which their testimony might be influenced by prosecutorial threats or promises. The Ninth Circuit's reported opinion severely undermines the rule of *Davis*, which ordinarily permits criminal defendants to present the jury with the very evidence excluded below, namely, evidence "afford[ing] a basis for an inference of undue pressure because of [a witness's] vulnerable status as a prosecutor." Now, thirty years later, at a time marked by an increasing number of documented cases of prosecutorial overreaching through "purchased" testimony, the protections of *Davis* ought to be at least reaffirmed by an authoritative pronouncement of this Court.

CONCLUSION

For all the reasons stated, the Court should grant certiorari in this matter.

Dated: May 31, 2000

Respectfully submitted,

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APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,
v.
Florence Martha BEARDSLEE, Defendant-Appellant.
United States of America, Plaintiff-Appellant-Cross-Appellee,
v.
Florence Martha Beardslee, Defendant-Appellee-Cross-Appellant.

Nos. 97-10286, 97-10314.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 15, 1999.

Filed Nov. 1, 1999.

Dennis P. Riordan, Riordan & Rosenthal, San Francisco, California, for defendant-appellant, defendant-appellee-cross-appellant Florence Martha Beardslee.

Martha Boersch, Assistant United States Attorney, San Francisco, California, for the plaintiff-appellee, plaintiff-appellant-cross-appellee.

Appeal from the United States District Court for the Northern District of California; D. Lowell Jensen, District Judge, Presiding. D.C. No. CR-94-00186-DLJ.

Before: CHOY, CANBY, and SILVERMAN, Circuit Judges.

CHOY, Circuit Judge:

Florence Martha Beardslee ("Beardslee") appeals her conviction, following a jury trial, for conspiracy in violation of 18 U.S.C. § 371, arson in violation of 18 U.S.C. § 844(i), use of fire to commit a felony in violation of 18 U.S.C. § 844(h), and mail fraud in violation of 18 U.S.C.

§ 1341. Beardslee contends that the district court erred by (1) barring cross-examination by Beardslee of government witness Ben Pierce; (2) limiting the scope of cross-examination by Beardslee of government witness Barry Venable; (3) ruling that Count Three of the superseding indictment, use of fire to commit mail fraud in violation of 18 U.S.C. § 844(h), was not barred by the statute of limitation; and (4) denying Beardslee's motion to suppress evidence on the ground that the Government had an independent source for the evidence. We reject each claim and affirm the decisions of the district court.

The Government cross-appeals Beardslee's sentence. The Government contends that the district court erred by (1) failing to impose Beardslee's sentence under 18 U.S.C. § 844(h) consecutively to all other sentences; (2) applying the 1989 Sentencing Guidelines instead of the 1992 Sentencing Guidelines to Beardslee's conspiracy conviction; (3) declining to make an upward adjustment to Beardslee's arson conviction for knowingly or recklessly creating a risk of harm; and (4) declining to enhance Beardslee's sentence for obstruction of justice. We affirm the district court on all but the first claim of the cross-appeal; on that claim alone we vacate and remand Beardslee's sentence for imposition of a sentence under 18 U.S.C. § 844(h) that runs consecutively to all other sentences.

Facts

On December 10, 1989, a fire burned a Fort Bragg, California, warehouse that was owned by Beardslee and

used in her business, Natural Beverage Distributors ("NBD").

Although investigators tentatively concluded that the cause of the fire was electrical, Beardslee called the Bureau of Alcohol, Tobacco & Firearms ("ATF") to report the fire as a suspected arson. Beardslee told an insurance investigator that she suspected that various individuals connected to Anheuser-Busch, Inc. ("Anheuser-Busch") might have a motive to set the fire. On August 28, 1989, Anheuser-Busch had terminated an agreement under which NBD was authorized as a wholesale distributor of Anheuser-Busch products. At the time of the fire, Beardslee was engaged in litigation with Anheuser-Busch over the fair market value of her assets, which consisted primarily of the warehouse, and the value of two times her pre-tax net earnings, to which she was entitled under her distributorship agreement with Anheuser-Busch.

Further investigation revealed the presence of gasoline in the area of the warehouse office, and investigators concluded that the fire was initiated by gasoline that had been poured into the warehouse structure through a drain pipe, and ignited. However, investigation of the fire became inactive after late 1990, and in early 1992 both the Fort Bragg police and the ATF closed their files without determining who was responsible for the fire. In the intervening period, in 1990 and 1991, Beardslee made claims to and received payments from the Fireman's Fund Insurance Company ("Fireman's Fund"), California Insurance Group, and Financial Indemnity Company ("Financial Indemnity") for losses sustained as a result of the fire.

At the time of the fire, Beardslee held a $350,000 Fireman's Fund insurance policy on the warehouse, which policy covered the cost of replacement of lost or damaged property due to fire. In August of 1989 – four months before the fire occurred – Beardslee had canceled all coverage on the warehouse except for the fire coverage; at that time, she had expressed concerns to her insurance broker that someone associated with Anheuser-Busch "might burn the building down." Fireman's Fund ultimately paid Beardslee a total of $85,150.43 for damage to the warehouse, and a total of $20,250 for lost rent. Beardslee also collected approximately $10,000 in insurance proceeds from Financial Indemnity for claims relating to damage to business vehicles owned by Beardslee and housed at her warehouse.

In early 1993, the ATF received a tip that Barry Venable ("Venable") had been involved in the fire. In March of 1993, Venable was arrested in Colorado on an unrelated matter. During an interview with the authorities, Venable confessed that he had been hired by Beardslee to burn the warehouse, and that he and Paul Glover ("Glover") had committed the arson. Venable also agreed to make a number of taped phone calls to Beardslee.

In the first of these calls, on March 30, 1993, Beardslee acknowledged that she had doubled the amount she agreed to pay Venable, and that she had already given him a car as partial payment. In another telephone conversation that occurred on April 1, 1993, Venable told Beardslee for the first time that he had recruited Glover to assist in setting the fire; Beardslee stated that she would not have arranged for the arson if she had known that anyone other than Venable would be involved.

Proceedings

On April 18, 1994, a federal grand jury returned an indictment charging Beardslee, Venable, and Glover with conspiracy in violation of 18 U.S.C. § 371 (Count One) and arson of a structure used in interstate commerce in violation of 18 U.S.C. § 844(i) (Count Two). Beardslee was also charged with mail fraud in violation of 18 U.S.C. § 1341, based on her submission of insurance claims concerning the burning of the building (Counts Three through Twenty-One).

After both Venable and Glover agreed to cooperate with the Government and pled guilty, a federal grand jury returned a superseding indictment against Beardslee on September 13, 1995. The superseding indictment added one charge, embodied in a new Count Three, alleging that Beardslee violated 18 U.S.C. § 844(h) by using fire to commit a federal felony offense-mail fraud, as charged in the remaining counts. The superseding indictment also changed Venable and Glover from defendants to unindicted co-conspirators in Count One and aiders and abettors in Count Two. The mail fraud counts (formerly Counts Three through Twenty-One) were renumbered to Counts Four through Twenty-Two, but in all other respects the superseding indictment remained the same as the original indictment.

Beardslee's first jury trial, which commenced on September 22, 1995, ended with a mistrial. The retrial began approximately one year later, and on October 30, 1996, the jury returned a verdict finding Beardslee guilty on all counts of the superseding indictment.

On June 4, 1997, Beardslee was sentenced to be imprisoned for a total of 87 months, comprised of 27-month terms for Counts One (conspiracy), Two (arson), and Four through Twenty-Two (mail fraud), all to run concurrently to each other, and a 60-month term for Count Three (use of fire to commit mail fraud), to run concurrently to the terms for Counts One and Two, but consecutively to the terms for Counts Four through Twenty-Two.

Discussion and Analysis

I. Cross-Examination of Pierce

In the summer or fall of 1989, Beardslee asked Ben Pierce ("Pierce") whether he could find someone to burn her warehouse. Pierce approached an acquaintance with money provided by Beardslee, but the acquaintance declined the offer. At Beardslee's first trial, Pierce was asked whether he was on probation at the time of his testimony. Pierce answered "yes" before the Government objected and before the district court sustained the objection. Prior to the second trial, the Government moved in limine seeking exclusion of any question regarding Pierce's probationary status or his willingness to take a polygraph test. The district court granted the Government's motion prior to Pierce's taking the stand in the second trial.

We review for an abuse of discretion the district court's decision to limit the scope of cross-examination. *See United States v. James*, 139 F.3d 709, 713 (9th Cir.1998). Whether limitations on cross-examination are so severe as

to amount to a violation of the confrontation clause is reviewed de novo. *See id.*

The district court did not abuse its discretion in determining that Pierce's probationary status was not an appropriate area of inquiry. Moreover, the limitation of Pierce's cross-examination did not violate the confrontation clause. In *James*, this court articulated a three-part inquiry to determine whether a criminal defendant's Sixth Amendment right to confront a witness against her has been violated by the exclusion of evidence.[1] *See id.* at 713 (applying the two-part inquiry from *Wood v. Alaska*, 957 F.2d 1544, 1549-50 (9th Cir.1992), as well as reading an implicit third inquiry into *Wood*'s holding). *James* held that the reviewing court must inquire whether: (1) the excluded evidence was relevant; (2) there were other legitimate interests outweighing the defendant's interest

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[1] *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), does not support Beardslee's argument that exclusion of interrogation regarding a witness's probationary status per se violates the confrontation clause. In *Davis*, the probationary status of a witness was relevant to the witness's bias because the witness, who testified to having observed the defendant's involvement in a burglary, was himself on probation for burglary, and thus had reason to believe that he might be a suspect in the crime for which the defendant had been charged. *See id.* at 310-11, 94 S.Ct. 1105. Here, there is no evidence that Pierce's probationary status involved an offense that was similar or relevant to those charged against Beardslee, nor is there evidence that Pierce's probationary status rendered him particularly subject to undue pressure from the authorities or the Government, as might be the case if Pierce himself remained vulnerable to prosecution.

in presenting the evidence; and (3) the exclusion of evidence left the jury with sufficient information to assess the credibility of the witness. *See id.*

The relevance of Pierce's probationary status is marginal, at best. The evidence against Beardslee encompassed not merely Pierce's testimony, but the testimony of Venable, Glover, and Guy Simpson – all of whom, unlike Pierce, were involved to some degree in the actual arson – as well as Beardslee's taped telephone conversations with Venable, and other pieces of circumstantial evidence, such as records of Beardslee's interaction with the authorities and Anheuser-Busch. Moreover, Pierce was adequately examined on other issues that touched on his credibility and possible bias against Beardslee, such as his failure to fully implicate Beardslee in his first ATF interview.

Accordingly, the district court did not err in barring cross-examination of Pierce regarding his probationary status.

II. Cross-Examination of Venable

At Beardslee's first trial, Venable was cross-examined regarding traffic violations he had committed in Colorado for driving without a valid license and without insurance. Venable had committed these violations after entering into his plea agreement but before the first Beardslee trial. Venable had failed to pay the fine imposed for the traffic violations, and a warrant had been issued in Colorado for his arrest. Under the terms of his plea agreement, if Venable broke any laws, the Government could, inter alia, reinstate the conspiracy charge or cause his

release to be revoked. Prior to the second trial, the Government moved in limine to exclude evidence of Venable's Colorado traffic citations. The district court granted the Government's motion, ruling that Venable could be asked only "whether or not he believes there is a benefit due him for his testimony."

The district court's limitation on cross-examination of Venable in the second trial does not amount to a confrontation clause violation under *James*'s three-part inquiry. Although evidence of Venable's traffic violations is not wholly irrelevant to the issue of whether he would have felt vulnerable to pressure from the Government, the marginal relevance of such evidence would likely have been outweighed by the risk of confusing the jury. Moreover, the jury had sufficient evidence to assess Venable's credibility, as he admitted on cross-examination that he didn't "live up to" his obligation under the plea agreement to "obey all laws," and that he believed that he had not been sanctioned for violating his obligations because he continued to cooperate with the Government. Under these circumstances, the specific manner in which Venable had failed to "obey all laws" would have been largely irrelevant to his credibility.[2]

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[2] The instant case clearly is distinguishable from *United States v. Steinberg*, 99 F.3d 1486 (9th Cir.1996) (disapproved of on other grounds by *United States v. Foster*, 165 F.3d 689 (9th Cir.1999)). *Steinberg* concerns, inter alia, whether a Brady violation occurs when exculpatory evidence is suppressed or otherwise left undisclosed. *See id.* at 1489 (describing standard for determining a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)).

In *Steinberg*, the Government had failed to disclose two pieces of information regarding its confidential informant and key witness against the defendant: (1) the informant/witness had been involved in ongoing criminal activity involving counterfeit currency around the time that he met the defendant and discussed a possible purchase of cocaine with counterfeit currency provided by the defendant; and (2) the informant/witness owed money to the defendant. *See id.* at 1488-89. On appeal, this court held that a new trial was required under Brady, because the undisclosed information was both exculpatory of the defendant and material to the issue of his guilt. *See id.* at 1489-92.

Unlike the criminal activity undertaken by the informant/witness in *Steinberg*, however, Venable's Colorado traffic citations do not relate to the underlying crimes of arson and mail fraud, and cannot be understood in any sense as potentially exculpating Beardslee. Furthermore, in *Steinberg*, the informant/witness's criminal activity was material in part because there was little evidence to corroborate his testimony regarding his transactions with the defendant. *See id.* at 1491. Here, Venable's testimony regarding Beardslee was corroborated by the testimony of other witnesses, as well as by the taped telephone conversations and other evidence.

Accordingly, the district court did not err in barring cross-examination of Venable regarding his Colorado traffic citations.

III. Limitation Period for Count Three

On September 21, 1995, Beardslee moved to dismiss Count Three of the superseding indictment – use of fire to commit mail fraud, in violation of 18 U.S.C. § 844(h).[3] She contended that the charge was barred by the five-year statute of limitation in 18 U.S.C. § 3282,[4] because the superseding indictment was not filed until September 13, 1995, almost six years after December 10, 1989, the date on which the indictment alleges the warehouse fire occurred. The district court denied the motion.

A limitation period begins to run only when all the elements of the underlying offense have been committed. *See United States v. Drebin*, 557 F.2d 1316, 1333 (9th Cir.1977). Count Three of the superseding indictment falls within the limitation period because a violation of section 844(h) is not complete until both a fire and a "felony which may be prosecuted in a court of the United States" have occurred. In the instant situation, mail fraud is clearly as much an element of Beardslee's section 844(h) violation as is the fire on which that fraud is premised; absent Beardslee's fraudulent use of the United States

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[3] Section 844(h) authorizes punishment of any person who "uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States." 18 U.S.C. § 844(h). Beardslee was charged with using fire to commit the felony of mail fraud in violation of 18 U.S.C. § 1341.

[4] Section 3282 provides, in pertinent part, that "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." 18 U.S.C. § 3282.

mails (or another federal felony), section 844(h) would not have been implicated at all, and she would have been charged only with arson and conspiracy.

Moreover, each mailing in furtherance of a prohibited scheme to defraud constitutes a separate mail-fraud violation. *See United States v. Poliak*, 823 F.2d 371, 372 (9th Cir.1987). A number of Beardslee's mail-fraud violations occurred after September 13, 1990 – and within the five-year limitation period provided by 18 U.S.C. § 3282. Thus, even assuming that the filing of the original indictment did not toll the running of the limitation period until the filing of the superseding indictment, Beardslee nevertheless violated section 844(h) within a five-year period of time preceding September 13, 1995, the date on which the superseding indictment was filed.

Accordingly, Count Three of the superseding indictment was not barred by the statute of limitation.

IV. Motion to Suppress

Shortly after the warehouse fire occurred on December 10, 1989, Beardslee consented to searches of the warehouse by authorities. On January 2, 1990, the ATF obtained a warrant to search the warehouse for "all business records relating to the operation of Natural Beverage Distributor [sic], including but not limited to sales invoices, supplier records, ledger cards, payroll receipts, bank accounts, and employee lists." Two days later, ATF agents executed the warrant, and took from the warehouse nine filing cabinets and seven boxes of business records, which the ATF stored at the Fort Bragg Police Department ("FBPD").

In December of 1991, the ATF began to close its investigation and contacted Beardslee to arrange for the return of the seized documents. In March of 1992, Beardslee signed and returned the property release form to the ATF. Shortly thereafter a friend of Beardslee retrieved selected documents from the FBPD, while leaving others behind.

In June of 1991, the judge in the ongoing civil litigation between Beardslee and Anheuser-Busch had ordered Beardslee to produce discovery in the form of business records. In October of 1992, Beardslee's attorney in the Anheuser-Busch litigation turned over to Anheuser-Busch copies of the records that Beardslee's friend had retrieved from the FBPD, and allowed Anheuser-Busch access to the documents that had been left behind at the FBPD.

In March of 1993, the Government reopened the investigation after receiving new information about the fire. Since that time, the only access the Government had to Beardslee's documents was through Anheuser-Busch pursuant to subpoena, or through the abandoned records at the FBPD.

On October 12, 1994, Beardslee submitted a pre-trial motion to the district court, seeking suppression of the evidence seized by the Government. In a written order, the district court found that the original warrant was insufficiently particular and constitutionally deficient, but denied Beardslee's motion to suppress, on the ground that the Government had an independent source for the evidence. We review de novo the district court's denial of

a motion to suppress. *See United States v. Kemmish*, 120 F.3d 937, 939 (9th Cir.1997).

The independent source doctrine allows the use of evidence that was improperly obtained, if that evidence ultimately or inevitably would have been discovered by lawful means. *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319 (1920). An implication of this doctrine is that evidence that is initially seized improperly may be rendered valid if it is later obtained (or "reseized") independently from activities untainted by the initial illegality. *See Murray v. United States*, 487 U.S. 533, 542, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988).

Here, the district court expressly found that "[t]he [G]overnment's decision to subpoena the documents from Anheuser-Busch, and to gather the abandoned records, was not prompted by the original unlawful search. The [G]overnment reopened the investigation only after obtaining new information in 1993." Indeed, in December of 1991, the ATF initiated the process of returning the seized documents to Beardslee because it was closing its investigation of the fire; the investigation was not re-opened until 1993, after Venable was arrested and confessed to being hired by Beardslee to burn her warehouse. Thus, the decision to subpoena Anheuser-Busch and access the documents at the FBPD did not derive from information obtained during the January, 1990, search and seizure. Moreover, the method by which the evidence was subsequently obtained – through subpoena and seizure of abandoned documents – was entirely proper. *See Abel v. United States*, 362 U.S. 217, 241, 80 S.Ct.

683, 4 L.Ed.2d 668 (1960) (appropriation of abandoned property not unlawful).

Accordingly, the district court did not err in denying Beardslee's motion to suppress evidence, on the ground that the Government had an independent source for the evidence that was seized.

V. Consecutive Sentences

The district court sentenced Beardslee to 27 months' imprisonment for each of Counts One, Two, and Four through Twenty-Two, all of the terms to run concurrently. The court also sentenced Beardslee to 60 months' imprisonment for Count Three, to run consecutively to the terms for Counts Four through Twenty-Two, but concurrently to the terms for Counts One and Two. We review statutory interpretation de novo. *See United States v. Neal*, 976 F.2d 601, 602 (9th Cir.1992).

Taken together, Beardslee's sentences present an apparent ambiguity. If the 27-month sentences for Counts One, Two, and Four through Twenty-Two are to run concurrently to each other, the 60-month sentence for Count Three cannot both run consecutively to the terms for Counts Four through Twenty-Two, and concurrently to the terms for Counts One and Two. It is thus unclear whether the district court intended the 60-month sentence for Count Three to run consecutively to all the other sentences, or concurrently to all the others.

What is clear, however, is the language of section 844(h) itself, which unambiguously provides that:

> Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried.

18 U.S.C. § 844(h) (emphasis added). Under the plain meaning of the statute's language, section 844(h) precludes a sentence imposed under section 844(h) from running concurrently to any other terms of imprisonment. Circuits that have addressed this issue support such a reading of section 844(h). *See, e.g., Sicurella v. United States*, 157 F.3d 177, 179 (2d Cir.1998).

Thus, regardless of what the district court intended, the 60-month sentence for Count Three must run consecutively to all the other sentences. Accordingly, we vacate the district court's imposition of the Count Three sentence running concurrently to those for Counts One and Two, and remand to the district court to impose a sentence for Count Three running consecutively to the terms for all other counts.

VI. Application of the Sentencing Guidelines for Conspiracy

The Government argues that the district court erred in refusing to apply the 1992 Sentencing Guidelines to calculate the sentence for Count One; the district court found that the conspiracy was completed when the warehouse burned in 1989, and thus used the 1989 Sentencing

Guidelines instead. The applicable provisions of the Sentencing Guidelines, U.S.S.G. § 2K1.4, were amended as of November 1, 1990. *See* United States Sentencing Guidelines Manual § 2K1.4 (Nov.1990) ("U.S.S.G."). The differences between the pre-amendment guidelines, which the district court applied, and the post-amendment guidelines are significant for the purposes of Beardslee's sentence. Pre-amendment sections 2K1.4(b)(1) and (2) correspond approximately to post-amendment sections 2K1.4(a)(1) and (2), although one important difference exists. Under both pre-amendment section 2K1.4(b)(1) and post-amendment section 2K1.4(a)(1), an offense level of 24 applies if the defendant knowingly created a substantial risk of death or serious bodily injury. Under the pre-amendment section 2K1.4(b)(2), an offense level of 20 applies if the defendant recklessly endangered the safety of another. However, under post-amendment section 2K1.4(a)(2), an offense level of 20 applies if the defendant created a substantial risk of death or serious bodily injury (whether or not recklessly) or if the offense involved the destruction or attempted destruction of a structure other than a dwelling. Thus, under the post-amendment guidelines, Beardslee's base offense level would necessarily be at least 20 because the warehouse that was burned was a structure other than a dwelling.

The Government argues that the post-amendment guidelines should apply, even though the fire itself occurred on December 10, 1989 (pre-amendment), because Beardslee's indictment indicated that the conspiracy continued until April 1, 1993 (post-amendment). Normally, a district court is to apply the version of the Sentencing Guidelines in effect on the date of sentencing.

See United States v. Warren, 980 F.2d 1300, 1304 (9th Cir.1992). However, an exception to this rule exists where application of an amended version of the guidelines would violate the Ex Post Facto Clause. *See id.* (citing *United States v. Castro*, 972 F.2d 1107, 1112 (9th Cir.1992)). If the underlying offense is a continuing offense, and continued after the relevant amendment has been made, the amended guidelines may be applied without offending the Ex Post Facto Clause. If, however, the underlying offense is a non-continuing offense that occurred before the amendment, or a continuing offense that was completed entirely before the amendment, the defendant must be sentenced under the relevant provisions of the guidelines in effect at the time the offense occurred. *See id.*

Conspiracy is a continuing offense. *See Castro*, 972 F.2d at 1112. Thus, if Beardslee's conspiracy continued after November 1, 1990, the post-amendment version of section 2K1.4 applies without Ex Post Facto Clause concerns. If, however, the conspiracy ended before November 1, 1990, the pre-amendment version of section 2K1.4 would apply. The relevant question, then, is whether the conspiracy at issue ended on December 10, 1989, when the warehouse burned, or continued until after November 1, 1990.

Count One of Beardslee's indictment described the underlying conspiracy as follows:

> Beginning in or about October of 1989, and continuing thereafter through on or about April 1, 1993 . . . [defendant Beardslee and co-conspirators] did knowingly and willfully combine,

> conspire[,] and agree together and with others . . . to maliciously damage and destroy, and attempt to maliciously damage and destroy, by means of fire and explosives, a building located at 930 North Franklin Street, Fort Bragg, California, which building was used in an activity affecting interstate and foreign commerce, in violation of Title 18, United States Code, Section 844(i).

Although the above paragraph makes reference only to the arson, the remainder of the indictment for Count One refers specifically to Beardslee's subsequent acts, stating that "[i]t was further a part of the conspiracy" for Beardslee to make false statements to the authorities, make false insurance claims, and compensate Venable for his role in the arson.

We affirm the district court's use of the 1989 Sentencing Guidelines because the district court reasonably found that the conspiracy was completed at the time the warehouse burned in December 1989. Of the subsequent acts described in the indictment, only the false insurance claims and compensation of Venable occurred after the effective date of the 1990 amendment. Both of these acts relate to whether Glover, who participated in the arson without Beardslee's prior knowledge, would be compensated for his role. These subsequent acts bear only a tenuous relationship to Beardslee's continuing involvement in the conspiracy. We see no reason therefore to disturb the district court's finding that the conspiracy was completed at the time the warehouse burned. *See United States v. Karlic*, 997 F.2d 564, 568 (9th Cir.1993). Sentencing Beardslee under the 1989 Sentencing Guidelines was proper because an application of the post-

amendment guidelines would have violated the Ex Post Facto Clause.

Accordingly, the district court did not err in imposing a sentence under the version of section 2K1.4 in effect on December 10, 1989.

VII. Upward Adjustment for Knowingly or Recklessly Creating a Risk

The Government further argues that the district court erred in declining to make an upward adjustment under the pre-1990-amendment version U.S.S.G. § 2K1.4(b), which requires an upward adjustment for knowingly creating a substantial risk of death or serious bodily injury, or for recklessly endangering the safety of another. We review for clear error the district court's findings regarding a sentencing enhancement. *See United States v. Karlic*, 997 F.2d 564, 568 (9th Cir.1993).

In Karlic, this court held that the analysis of whether a sentencing enhancement is warranted under section 2K1.4(b) requires two distinct inquiries:

> First, the court must ask whether the defendant's actions created a substantial risk of death or injury. This is an objective question that focuses on the circumstances surrounding the offense. A finding that there was a substantial risk of death or injury is a necessary predicate to the second, subjective, inquiry, which asks whether the defendant acted knowingly or recklessly in creating that risk.

Id. at 569. Because the guidelines do not define "knowingly" or "recklessly," this court applied the meanings of those terms under the Model Penal Code, and accordingly explained that a defendant acts knowingly with regard to section 2K1.4 if: (1) it is practically certain that her actions would cause a substantial risk of death or serious injury, and (2) she was aware of that fact. *See id.* Conversely, a defendant acts, at most, recklessly if it was not a practical certainty that her conduct would cause a substantial risk of death or serious injury, or where it was a practical certainty but the defendant was not aware of that fact. *See id.* at 570.

In light of this standard, the district court did not clearly err in finding that Beardslee did not act knowingly or recklessly within the meaning of section 2K1.4. Beardslee was doubtless aware that there was a possibility that her actions – or the actions of Venable, under her direction – would cause a substantial risk of death or serious bodily injury. However, a possibility, even a considerable one, is not the same as a "practical certainty," and here it was not practically certain that the burning of Beardslee's warehouse would create a substantial risk of death or injury.

The arson occurred in the middle of the night and, although the warehouse was not entirely isolated, it was located in a non-residential area and was not immediately adjacent to its neighboring buildings. The considerable disparity between the circumstances of the instant case, and those of cases in which this court found a defendant's actions to be practically certain to create a substantial risk of death or serious injury, supports clearly the

district court's decision not to make an upward adjustment. *See, e.g., Karlic*, 997 F.2d at 570 (defendant was aware that neighboring residents were practically certain to be present during time of explosion, and that people did in fact use depositories located in the building to be destroyed, even in the middle of the night); *United States v. Bos*, 917 F.2d 1178, 1182 (9th Cir.1990) (defendant attempted to blow up a store near public streets and other businesses with pedestrian access); *see also United States v. Bader*, 956 F.2d 708, 710-11 (7th Cir.1992) (defendant pipe-bombed house that he knew to be occupied); *United States v. Wilson*, 927 F.2d 1188, 1190 (11th Cir.1991) (defendant set fire with multiple points of origin thirty-five feet from an inhabited apartment complex).

Accordingly, the district court did not clearly err in declining to make an upward adjustment under the pre-1990-amendment version of U.S.S.G. § 2K1.4(b).

VIII. Obstruction of Justice

Finally, the Government argues that the district court erred in stating, without elaboration, that it would not make a factual finding that an obstruction-of-justice enhancement, pursuant to U.S.S.G. § 3C1.1,[5] should be applied. The district court's application of the Sentencing

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[5] The applicable version of section 3C1.1 provides that:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

U.S.S.G. § 3C1.1 (Nov.1997).

Guidelines to the facts of a particular case is reviewed for an abuse of discretion. *See United States v. Aguilar-Ayala*, 120 F.3d 176, 177-78 (9th Cir.1997).

The application notes to section 3C1.1 provide a non-exhaustive list of examples of types of conduct to which the enhancement applies, which list includes committing perjury, providing materially false information to a judge, and providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the offense at issue. The application notes explain, however, that "[a] defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision." Furthermore, the defendant's testimony and statements should be evaluated in the light most favorable to her. *See* U.S.S.G. § 3C1.1, comment, n.1.

When we consider Beardslee's testimony and statements in the light most favorable to her, we cannot say that the district court abused its discretion when it declined to enhance Beardslee's sentence for obstruction of justice. Beardslee's in-court statements, and her statement to the authorities that she suspected Anheuser-Busch to be the arsonist, do not constitute a significant obstruction of or impediment to the investigation within the contemplation of the Sentencing Guidelines. Cf. *United States v. McNally*, 159 F.3d 1215, 1217 (9th Cir.1998) (not abuse of discretion to enhance sentence under section 3C1.1 when defendant's concealment of child from

authorities created actual impediment to kidnaping investigation).

Accordingly, the district court did not err in declining to enhance Beardslee's sentence pursuant to section 3C1.1 for obstruction of justice.

Conclusion

For the foregoing reasons, we affirm the decision of the district court with regard to all issues except the sentence for Count Three running concurrently to the sentences for Counts One and Two; as to that issue, we vacate the sentence imposed by the district court and remand for the court to impose a sentence for Count Three running consecutively to all other sentences.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

APPENDIX B

United States District Court

For the Northern District of California

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	(Filed Apr. 9, 1997)
FLORENCE MARTHA BEARDSLEE,	)	No. CR-94-0186 DLJ
Defendant.	)	**ORDER**

On April 2, 1997, the Court heard arguments on defendant's motion for a new trial. Dennis P. Riordan appeared on behalf of the defendant and Assistant United States Attorneys Joel Levin and Martha Boersch appeared on behalf of the United States. Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby DENIES defendant's motion.

I. BACKGROUND

A. Factual Background and Procedural History

Defendant Florence Martha Beardslee was convicted in October 1996 of one count of conspiracy, one count of using fire to commit a felony, one count of arson, and twenty-one counts of mail fraud. Defendant's previous trial on similar counts ended in a mistrial.

On March 12, 1997, defendant filed the instant motion for a new trial. Plaintiff argues that the Court's

refusal to permit cross-examination of Ben Pierce regarding his probationary status and of Barry Venable regarding post-plea criminality was error. Defendant argues that the availability of these lines of examination in the first trail but not in the second explains the different results at the two trials.[1]

B. Legal Standard

The Court has discretion to control the scope of cross-examination, which discretion is reviewed for an abuse of discretion. *See* FRE 611; *United States v. Dischner*, 974 F.2d 1502, 1514 n. 12 (9th Cir. 1992), *cert. denied*, 507 U.S. 923 (1993). This discretion may be exercised up to the limit of the Confrontation Clause of the Sixth Amendment.

II. ARGUMENT

A. Testimony of Ben Pierce

In arguing that she should have been permitted to cross-examine Ben Pierce regarding his probationary status, the defendant relies almost exclusively on *Davis v. Alaska*, 94 S.Ct. 1105 (1974). In that case, Richard Green, the government's sole eyewitness in a burglary case, was on probation for burglary at the time of the crime charged and lived near the property on which the stolen item was found. The Supreme Court overturned the defendant's conviction, arguing that the cross-examination regarding

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[1] Defendant maintains that the first jury hung in her favor. There is nothing in the record to indicate whether that is true.

the defendant's probationary status sought by the defendant "was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, as well as of Green's possible concern that he might be a suspect in the investigation." *Id.* at 1111 (citations and footnotes omitted).

Defendant's reliance on the *Davis* decision is misplaced for a number of reasons. First, there is nothing in the record to indicate that Ben Pierce was on probation during the second trial. While it is true that he was on probation when he testified at the first trial, defendant has wholly failed to demonstrate that he remained on probation when he testified a second time. Therefore, defendant has not shown that the error she complains of actually occurred.

Second, the Supreme Court has made clear that *Davis* did not create a per se rule requiring reversal for failure to permit cross-examination regarding probationary status. In *Delaware v. Van Aredall*, 106 S.Ct. 1431, 1437 (1986) the Court made clear that its Davis decision was based in part on its finding that "there was a 'real possibility' that pursuit of the excluded line of impeachment evidence would have done '[s]erious damage to the strength of the State's case.' " No such showing has been made here. Even assuming, *arguendo* that Pierce was on probation at the time of the second trial, defendant has failed to show how this fact made him vulnerable to government influence. In *Davis*, Green was on probation for burglary and the property Davis was charged with burglarizing was found near Green's home. Thus, Green had a strong incentive to redirect police attention away from himself. Here, no such showing was made; the mere fact that

Pierce was on probation, if true, is insufficient to establish his bias in favor of the government.

Finally, unlike in *Davis* where the challenged witness was the only eyewitness to the alleged burglary, here, Ben Pierce was a relatively minor witness for the government. By the defendant's own admission, Pierce "testified he did not participate in actual arson of the warehouse and did not know who did." Motion at 2: 1-2. Thus, his testimony, unlike Green's in Davis, "would have been legally insufficient to convict Beardslee of the charged offense." Id. at 2: 3-4.

For all of these reasons, the Court concludes that refusing to permit cross-examination of Ben Pierce regarding his probationary status was not error. Furthermore, even if it were error to exclude evidence of Pierce's probationary status, the government has shown beyond a reasonable doubt that such error was harmless.

B. Testimony of Barry Venable

At the first trial, Barry Venable was questioned about two traffic violations he had committed and the resulting warrants which had issued for him. Prior to the second trial, the government moved *in limine* to exclude this line of questions and the Court agreed to do so. The defendant now argues that this ruling was error, as the post-plea misdeeds showed that Venable had violated the terms of his plea agreement with the government and that he had not been punished for doing so.

Defendant essentially admits that the arrests are inadmissible to attack Venable's credibility under FRE

608(b) and 609. Rather, she argues that the evidence should come in as evidence of bias in favor of the prosecution. Because Venable had committed acts which could cause charges to be reinstated or his release to be revoked, defendant argues, the government's failure to sanction defendant was a benefit of which the jury should have been made aware.

However, although the exact instances of misconduct were not brought before the jury, the defendant cross-examined Venable extensively regarding his post-plea conduct. For example, the defendant elicited Venable's testimony that it was a condition of his plea agreement and of his release on his own recognizance that he obey all state and federal laws. Venable then admitted he "repeatedly broke those promises" and that he "didn't live up to" his obligation to obey all laws. Furthermore, when Venable was asked whether he thought one of the reasons he had not been sanctioned for his violations was his continued cooperation with the government, he answered yes. Reporter's Transcript at 357-60.

Thus, the jury heard that Venable had violated his plea agreement and the terms of his release, that he had not been sanctioned for doing so, and that he believed the reason he had not been punished was his cooperation with the prosecution. Therefore, although the jury did not hear the details of his violation, which were almost certainly less serious than the details the jury could have inferred from his testimony, the defendant was able to show Venable's alleged bias in favor of the prosecution. Thus, even if it were error to refuse to permit the defendant to question Venable on the details of his post-plea criminality, that error was harmless as a matter of law.

The other opportunities provided to the defendant were sufficient to satisfy the requirements of the Confrontation Clause.

III. CONCLUSION

For the reasons stated above, the Court hereby DENIES Beardslee's motion for a new trial.

IT IS SO ORDERED.

Dated: April 9, 1997

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

APPENDIX C

UNITED STATES of America, Plaintiff-Appellee,
v.
Florence Martha BEARDSLEE, Defendant-Appellant.
United States of America, Plaintiff-Appellant-Cross-Appellee,
v.
Florence Martha Beardslee, Defendant-Appellee-Cross-Appellant.

Nos. 97-10286, 97-10314.

United States Court of Appeals,
Ninth Circuit.

March 2, 2000.

Before: CHOY, CANBY, and SILVERMAN, Circuit Judges.

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

The opinion filed on November 1, 1999 [197 F.3d 378] is hereby amended as follows:

1. Delete the third full paragraph at 197 F.3d at 383 (beginning "The district court did not abuse . . . "), including footnote 1, and substitute the following paragraph and new footnote 1:

Beardslee contends that he was entitled to cross-examine Pierce about his probationary status under the rule of *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).[1] Even if we

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[1] *Davis* was a considerably different case from Beardslee's. In *Davis*, the witness was a possible suspect in the crime for which *Davis* was being tried, and his testimony was crucial in identifying *Davis* as the perpetrator. *See Davis*, 415 U.S. at 317-318, 94 S.Ct. 1105. The witness had also denied ever having

assume, without deciding, that the district court erred in precluding cross-examination of Pierce on that subject, any such error was harmless beyond a reasonable doubt. *See Delaware v. Van Arsdall*, 475 U.S. 673, 682-83, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (*Davis* error in violation of confrontation clause is subject to harmless error analysis).

2. Delete the last paragraph at 197 F.3d at 383 (beginning "Accordingly, the district court . . . "), and substitute the following:

Accordingly, the error, if any, of the district court in precluding cross-examination regarding Pierce's probationary status was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

With the Opinion so amended, the panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judge Silverman has voted to deny the petition for rehearing en banc, and Judges Choy and Canby have recommended the same.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R.App. P. 35.

The petition for rehearing and the petition for rehearing en banc are hereby DENIED.

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been interrogated by the police on prior occasions. *See id.* at 316, 94 S.Ct. 1105.